IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL SIDE

INCOME TAX APPEAL NO.125 OF 2003

Zenith Ltd. Appellant

vs.

1. Dy. Commissioner of Income
Tax, Circle 1(3) & Anr. Respondents

Ms. Vissanji with Mr.s.J. Mehta for the appellant.

Mr.R.V.Desai, senior counsel with Mr.B.M. Chatterjee
and Ms.S.V. Bharucha for the respondents.

CORAM : R. M. LODHA &
J.P. DEVADHAR,JJ.

DATED : 11th October 2004

ORAL ORDER :(Per R.M.Lodha,J.)

By our order dated 22nd September 2004 we granted time to the learned counsel for the appellant to satisfy us that the appeal under Section 260A of the Income Tax Act, 1961 was maintainable against the order dated 18th October 2002. The Income Tax Appellate Tribunal by the impugned order rejected the appellant's application for leave to add additional grounds in the appeal preferred by them.

2. Ms.Vissanji, the learned counsel for the appellant submitted that the impugned order vitally affects the rights of the appellant and the said order is covered by

the expression "every order passed in appeal by the Appellate Tribunal" occurring in section 260A. She relied upon the judgment of the Supreme Court in the case of Shah Babulal Khimji v. Jayaben D. Kania & anr., AIR 1981 S.C.1786.

3. Section 260A of the Income Tax Act, 1961 reads thus:

> "260A. (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal, if the High Court is satisfied that the case involves a substantial question of law.
>
> (2) The Chief Commissioner or the Commissioner or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be -
>
> > (a) filed within one hundred and twenty days from the date on which the order appealed against is received by the assessee or the Chief Commissioner or Commissioner;
> >
> > (b) ...
> >
> > (c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.
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> (3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
>
> (4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:
>
> Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear for reasons to be recorded, the appeal on any other substantial question of

law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which -

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.

4. The expression "every order passed in appeal" cannot be construed to take in its fold all interlocutory orders that may be passed by the Income Tax Appellate Tribunal, during the pendency of the appeal, particularly such orders which are procedural in nature. By use of the expression "every order passed in appeal", the Legislature never contemplated nor intended that appeal may be preferred by an aggrieved party under section 260A to the High Court challenging the interlocutory orders particularly those which are procedural in nature not affecting the rights or liabilities of the parties. Though an exhaustive or a comprehensive definition of the expression ‘every order

passed in appeal' cannot be properly given nor do we venture to do that but suffice to say that in finding out whether the order is covered by the expression, 'every order passed in appeal' within the meaning of section 260A of Income Tax Act, 1961, it has to be found out that order affects the merits of the action by determining some right or liability. The order by the Income Tax Appellate Tribunal declining the appellant to add additional grounds is only an order procedural in nature and cannot be said to affect the rights of such party. More so because it is always open to the aggrieved party to challenge such interlocutory order in the appeal that may be preferred against the final order. The correctness of such interlocutory order being open to be challenged in appeal that may be preferred by the aggrieved person against the final order, we have no hesitation in holding that the present appeal is not maintainable.

5. To our specific query to the learned counsel for the appellant as to under which provision the application was made by the appellant before the Tribunal for additional grounds, the learned counsel for the appellant invited our attention to Rule 11 of the Appellate Tribunal Rules, 1963.

6. Rule 11 of the Appellate Tribunal Rules, 1963 reads

thus:

> "11. The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule:
>
> Provided that the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground."

7. The order of the Tribunal declining to grant leave to urge the grounds not set forth in the appeal does not determine the rights of the parties. The invocation of Rule 11 is procedural in nature and so also such order.

8. We are, therefore, of the view that the present appeal preferred by the appellant under Section 260A is not maintainable against the impugned order declining the appellant to raise additional grounds in the memorandum of appeal.

9. The appeal is, accordingly, dismissed as not maintainable.

(R.M. LODHA,J.)

(J.P. DEVADHAR,J.)